

# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN**

PHILIP LEE; PAMELA WHITE;  
PATRICIA VANDUSEN;  
RONALD ALLIX; AND RANDY  
WELCH, individually and on behalf of  
others similarly situated,

*Plaintiffs,*

v.

BELVOIR MEDIA GROUP, LLC,

*Defendant.*

Case No. 4:22-cv-12153

Hon. Shalina D. Kumar

Magistrate Judge David R. Grand

**DEFENDANT BELVOIR MEDIA GROUP, LLC'S  
NOTICE OF SUPPLEMENTAL AUTHORITY**

## INTRODUCTION

Defendant Belvoir Media Group, LLC (“Belvoir” or “Defendant”) respectfully notifies the Court of a highly relevant case decided after the close of briefing—*Compagner v. Burch*, No. 359699, --- N.W.2d ----, 2023 WL 3766734 (Mich. Ct. App. June 1, 2023), (the “*Compagner* Decision,” attached hereto as Exhibit 1)—and of further appellate proceedings in *Carter v. DTN Mgmt. Co.*, 991 N.W.2d 586 (Mich. 2023) (Mem.) (the “*Carter II* Order,” attached hereto as Exhibit 2). These cases undercut Plaintiffs’ position that they are entitled to “COVID-19 tolling” to save their otherwise untimely claims. To support their argument, Plaintiffs have relied on *Carter v. DTN Mgmt. Co.*, --- Mich. App. ----; --- N.W.2d ----, 2023 WL 439760 (Mich. Ct. App. Jan. 26, 2023) (“*Carter I*”). But the reasoning and holding in *Carter I* is now in question under the *Compagner* Decision and the *Carter II* Order. Indeed, the Michigan Court of Appeals panel in *Compagner* expressly rejected the analysis in *Carter I*, and the Michigan Supreme Court has agreed to review the holdings in *Carter I*.

## ARGUMENT

Belvoir moved to dismiss Plaintiffs’ First Amended Complaint (“FAC”) pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6) on several bases, including that Plaintiffs’ claims are time-barred. (ECF No. 18, PageID.1173-82.) In their Opposition, Plaintiffs relied on the January 26, 2023 order issued by the

Michigan Court of Appeals in *Carter I* to support their contention that the orders issued during the COVID-19 pandemic (the “Orders”) toll certain filing deadlines and rendered their claims timely under the six-year limitation period Plaintiffs have argued applies. (ECF No. 19, PageID.1239, 1241-42.) Since their Opposition, Plaintiffs have submitted Notices of Supplemental Authority concerning PPPA actions wherein COVID-19 tolling has been applied based on *Carter I*.<sup>1</sup>

In view of the *Compagner* Decision and the *Carter II* Order, Plaintiffs’ reliance on *Carter I* and the supplemental authority they submitted relying on *Carter I* must be considered with caution.

#### **I. *Compagner* Undermines the Holdings of *Carter I*.**

Nearly six months after the decision in *Carter I*, a separate panel of judges for the Michigan Court of Appeals held that “*Carter* was wrongly decided” because the Michigan “Supreme Court did not have the constitutional authority to issue” the Orders, rendering them invalid and incapable of saving the plaintiffs’ “untimely filed” complaint. *Compagner*, 2023 WL 3766734, at \*16. The *Compagner* court concluded that it was required to “follow *Carter* on this issue” and, because it

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<sup>1</sup> *Briscoe v. NTVB Media Inc.*, No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023) (citing *Carter I* in finding that COVID tolling should apply in the PPPA action); *Gottsleben v. Informa Media, Inc.*, No. 1:22-cv-866, ECF No. 51 (W.D. Mich., July 7, 2023) (same).

disagreed, “declare a conflict with *Carter* relative to the constitutional validity of the Supreme Court’s” Orders pursuant to M.C.R. 7.215(J). *Id.* at \*8, \*17.

Underscoring “the muddled nature of the caselaw” related to the applicability of the Orders, the *Compagner* court also reasoned that *Carter I*’s conclusion that the Orders tolled deadlines that expired after those Orders were rescinded in 2020 was “inconsistent” with both the language of the COVID-19 Orders and two other “controlling, published” Michigan Court of Appeals cases, which “interpreted [those Orders] as applying only to deadlines (for filing case-initiation or responsive pleadings) ‘during the state of emergency’” related to COVID-19 in 2020, pursuant to the express language of the Orders. *Id.* at \*6-8 (citing *Wenkel v. Farm Bureau Gen. Ins. Co. of Mich.*, No. 358526, --- N.W.2d ----, 2022 WL 17364773, at \*4 (Mich. Ct. App. Dec. 1, 2022), appeal denied, 988 N.W.2d 482 (Mich. 2023); *Armijo v. Bronson Methodist Hosp.*, No. 358728, --- N.W.2d ----, 2023 WL 324450, at \*5, 6-7 (Mich. Ct. App. Jan. 19, 2023)).

Not only does the *Compagner* Decision undercut Plaintiffs’ argument that COVID-19 tolling should be permitted here, but the cases upon which it relies also demonstrate the unsettled nature of this issue. The *Compagner* Decision questions both the constitutionality of the Orders and *Carter I*’s substantive analysis of their applicability. This Court should not apply the reasoning of *Carter I* to save Plaintiffs’ claims here.

## **II. The Michigan Supreme Court Should Decide the Issue of COVID-19 Tolling.**

As a decision of an intermediate state court, the Michigan Court of Appeal's January 2023 ruling in *Carter I* is not binding here. However, the same would not be true as to a decision by the Michigan Supreme Court: "in general, 'only the law as expressed by the highest court of a State is binding on this Court in a diversity action.'" *Eastham v. Chesapeake Appalachia, L.L.C.*, 754 F.3d 356, 362 (6<sup>th</sup> Cir. 2014) (quoting *Ruth v. Bituminous Cas. Corp.*, 427 F.2d 290, 292 (6<sup>th</sup> Cir. 1970)). This bears particular force here, as following the Michigan Court of Appeals' published opinions in both *Compagner* and *Carter I* would be impossible, given that *Compagner* expressly and vociferously disagreed with relevant portions of *Carter I*. *Compagner*, 2023 WL 3766734, at \*1, 8-17.

Further weakening the persuasive value of *Carter I* is the fact that the Michigan Supreme Court has taken the case up on review. *Carter*, 991 N.W.2d 586. The *Carter II* Order directs the parties to "address whether this Court possessed the authority to issue Administrative Order Nos. 2020-3 and 2020-18." *Id.*; ECF No. 18, PageID.1182.

## **CONCLUSION**

For the foregoing reasons, the Court should follow the *Compagner* Decision and hold that COVID-19 tolling does not apply, and Plaintiffs' claims are time-barred. It should thereafter grant Belvoir's Motion to Dismiss Plaintiffs' stale claims.

Date: September 13, 2023

Respectfully submitted,

/s/ Kristen C. Rodriguez

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**Certificate of Service**

I hereby certify that on September 13, 2023, a copy of the foregoing document was filed electronically and served by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Kristen C. Rodriguez  
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